FILED
April 19, 2004
NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINES

IN THE MATTER OF THE SUSPENSION OR REVOCATION OF THE LICENSE OF:	Administrative Action
JACK C. LEE, M.D.	FINAL DECISION & ORDER
TO PRACTICE MEDICINE AND SURGERY IN THE STATE OF NEW JERSEY	

This matter was opened to the New Jersey State Board of Medical Examiners on September 5, 2003 upon the filing of an Administrative Complaint by Peter C. Harvey, Attorney General of New Jersey, by Joan D. Gelber, Deputy Attorney General. The Verified Complaint in this matter alleged in two counts that on two occasions, respondent had issued threatening electronic mail messages to two newspaper reporters - once on February 10, 2003 and again on February 16, 2003. The complaint also alleged that respondent was charged criminally with two counts of making terroristic threats (inviolation of N.J.S.A. 2C:12-3(b)), and that in connection with his entry into pretrial intervention he acknowledged that he had sent two threatening e-mails to the newspaper reporters. This conduct was said to constitute professional misconduct, engaging in acts constituting a crime or offense involving moral turpitude or relating adversely to the activity regulated by the Board; failure of the ongoing requirement to maintain good moral character and incapacity for medical or

other good cause of discharging the functions of a licensee, in violation of N.J.S.A.45:1-21(e), (f), and (i) and of N.J.S.A.45:9-6.

On October 31, 2003, respondent filed a Notice of Motion to Dismiss the Administrative Complaint. Along with the State's response, it filed a Cross Motion for Summary Decision and the imposition of sanctions. Respondent, represented by Steven Kern and Bonnie Weir, Esqs., filed papers responsive to the Cross Motion. The Motion to Dismiss the complaint was considered before the Board of Medical Examiners on November 12, 2003, with consideration given by the Board to all documents submitted.[1]

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[1] In support *of* his Motion *to* Dismiss the complaint, respondent submitted and relied on the following:

1. A Memorandum of Law.
2. Exhibit A - Report prepared by Louis Baxter, M.D. dated June 25, 2003.
3. Exhibit B - Report of Dr. Goldstein dated May 23, 2003.
4. Exhibit C - Transcript of Proceedings before the Hon. Eugene Austin, J.S.C. - June 26, 2003.

In response to the Motion to Dismiss and in support of its Motion For Summary Decision, the State submitted and relied on the following:

1. Letter Brief dated November 3, 2003.
2. An e-mail message dated February 10, 2003 to Lindy Washburn and a "cc:" to Mary Jo Layton.
3. A sworn statement of Lindy Washburn dated July 3, 2003.
4. An e-mail to Lindy Washburn dated February 16, 2003 (with "cc:").
5. An article entitled Doctor's E-Mail Threats Lead to Terror Charges dated June 5, 2003.
6. Hackensack Police Department Miranda Rights/Waiver of Rights Form dated April 1, 2003.
7. Hackensack Police Department Detective Division - Voluntary Statement (of Dr. Jack Lee) - April 1, 2003.
8. Two Rackensack Police Department Complaints regarding Dr.

The Board determined upon initial consideration of the Motion to Dismiss on, November 12, 2003, to deny respondent's motion, finding that the facts alleged, if proven, would constitute violations of the statutes governing the practice of medicine. The Board also recognized at that time that respondent had failed to file a timely answer to the complaint. Therefore, on its own motion, the Board directed that respondent would have an additional seven (7) days to file with the Board and transmit to the Attorney General, an answer (the Board's notification to respondent required that his answer had to be received no later than Tuesday, December 2, 2003).[2] In the event an answer was filed within the extended

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Jack Lee - April 7, 2003 (#0304393 regarding Lindy Washburn;

(footnote continued)
#0304394 regarding MaryJo Layton).

9. Letter of Resignation of Jack Lee, M.D. to Englewood Hospital and Medical Center dated May 1, 2003.

10. Certification regarding a letter of resignation from Jack C. Lee dated May 1, 2003.

11. Pretrial Intervention Order of Postponement in State of New Jersey v. Jack Lee dated June 25, 2003.

In reply to the Attorney General's submissions respondent submitted and relied on the following:

1. Reply Memorandum of Law.

On December 1, 2003, the State submitted a Certification of Costs. No response was submitted.

[2]The Board also determined that if no answer was received by the date specified respondent would be considered in default and the matter heard by way of default on December 10, 2003.

time period permitted by the Board, the Board would, as it had previously notified the parties, hear oral argument on the Motion for Summary Decision on December 10, 2003, and if Summary Decision was granted, the parties were to be prepared to address mitigation immediately thereafter.[3]

Following the receipt of an answer from respondent on December 2, 2003, the Board heard oral argument on the Motion For Summary Decision at its meeting of December 10, 2003. At the outset of the proceedings respondent's counsel made an oral motion to disqualify Deputy Attorney General Gelber from further participation in this matter due to contacts and activities with Board members in June of 2003, some three months prior to the filing of the Administrative Complaint. We denied the Motion and found that the participation of Ms. Gelber is consistent with the case law and previous determinations of the Board.[4]

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[3] The Board also decided on November 12, 2003 to deny respondent's request to transfer the matter to the Office of Administrative Law, as it has the authority and ability to determine the issues involved in this matter.

[4] Counsel asserted that the contacts involved ex parte communications with members of *the* Board, and that therefore Ms. Gelber could not thereafter seek to prosecute the matter before the Board. Counsel has made similar arguments in matters previously heard by this Board. In one matter counsel made nearly identical arguments regarding the same Deputy Attorney General, and on appeal, the Appellate Division found nothing improper in the procedure utilized by the Office of the *Attorney* General - finding that a Deputy Attorney General who is involved in and advising the Board during the investigative phase of a matter, may then prosecute the matter on behalf of the State. *See*, In re Suspension of Miller, M.D., Dkt. #A-2240-81T3, App. Div. (unreported), June 28

Having denied respondent's motion, the Board moved forward to the merits of the Attorney General's application for Summary Decision. The Attorney General maintained that because of the simple and undisputed facts of this matter, it is amenable to resolution via motion for summary decision, and that an evidentiary hearing is neither warranted by the facts nor required by law.

The State argued that on multiple occasions beginning in April 2003, respondent has repeatedly acknowledged and admitted sending the e-mails as alleged in the complaint. Respondent admitted in a signed statement at the Hackensack Police Department (Sa13 to Sa16[5]); in his identifying and marking e-mails of February 10 and February 16, 2003, both at the time of his police statement and before a Committee of *the* Board on June 25, 2003 (Sal to Sa2); and via his admission before the Bergen County Superior Court in connection with an application for entry into Pretrial Intervention; that he sent two threatening e-mails *to* two reporters of the Bergen Record, and that he apologized for having made

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1982 (attached}. Counsel cited no New Jersey decision to the contrary. The procedure utilized by DAG Gelber appears consistent with the decisions of the appellate courts *of* this State. Indeed one *of the* leading opinions in the area, Matter of Opinion 583, 107 N.J. *230* (1987) indicates that even after the filing of a formal complaint, during the pendency of a prosecution, some ex parte communications between the prosecutor and the administrative agency are permissible.

[5] "Sa" shall refer to the state's appendix submitted with its November 3, 2003 brief in support of the Motion For Summary Decision.

threatening remarks (p. 7 *of* PTI transcript attached to respondent's brief of October 31, 2003); and finally he acknowledged the e-mails in his answer before this Board.

In his statement to the police (Sa14 to Sa16) respondent admits that in the doctor's lounge at Englewood Hospital after reading an article in the Bergen Record that he felt was biased against physicians, he "...responded to the two authors with a derogatory e-mail to them. I later sent them a further e-mail in a threatening manner." (Sa 15). The content of the e-mails respondent identified as those he forwarded to two reporters for the Bergen Record on February 10, 2003 is as follows:

From: YougonnaDie [freenj99@yahoo.com]
Sent: Monday, February 10, *2003* 1:50 PM
To: washburn@northjersey.com
cc: lavton@northiersev.com
Subject: not very nice

How much did the trial lawyers pay you to write such nonsense in the Bergen Record? I will track both of you down and seek vengeance in a not-so-nice manner.

Regardless of how much they pay you, you should think before you publish your opinions to the not-so-educated people of New Jersey. You will regret ever having written your biased articles.

Sincerely,

On February 16, 2003, another set of e-mails was forwarded by respondent to the same twc reporters with the identification of the sender listed as "YougonnaDie [freenj99@Yahoo.com]" . The text of the e-mail was as follows: DEATH SHALL BE IMMINENT.

The State argued that as there is no dispute as to the content

of the e-mails, the sender of the e-mails, the name or pseudonym utilized by the sender, the criminal charges brought and subsequent entry into the PTI Program, there is no genuine issue of material fact in dispute to be determined, and the only issue presented is a matter of law. The State further argued that the admitted conduct in this case indisputably included death threats, which the Board could conclude constitute an offense of moral turpitude, or one relating adversely to the profession, or professional misconduct.

In respondent's answer and argument, he acknowledged that the facts of *the* matter are undisputed (T27-14 to 16).[6] Respondent maintained that the issue is whether there has been a violation of the statutes regulating the practice of medicine. Respondent argued that as the complaint alleged the issuance of terroristic threats, and as necessary elements of the crime of making terroristic threats (such as whether the e-mail reasonably caused the victim to believe the immediacy of her death) have not been proven, that in order to determine whether the language of the e-mails admittedly sent constitute a crime or acts of moral turpitude, a hearing must be held to determine the context in which the statements were made and the intent [of respondent] (T34-20 to T37-10).

[6] "T" reflects to the transcript of the hearing of December 10, 2003.

DISCUSSION

This Board may enter summary decision pursuant to N.J.A.C. 1:1-12.5 when the documents filed demonstrate that "there is no genuine issue as to any material fact challenged and [that] the moving party is entitled to prevail as a matter of law." Summary decision motions are governed by the Administrative Procedure Rules. The adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. N.J.A.C. 1:1-15.5(b).

We disagree with respondent's assertion that summary decision does not apply to this license proceeding. We find that the State has demonstrated sufficient undisputed facts for the Board to determine liability as to all counts of the Complaint. However, the Board declines to reach certain legal conclusions regarding whether certain of the statutes cited have been violated as will be more fully explored below. We also find that respondent has failed to show by responding affidavit specific facts demonstrating genuine issues which can only be determined in an evidentiary proceeding. In so finding we have relied solely on respondent's admissions. Based on those statements of respondent we find that he sent e-mails containing death threats and other threats to two newspaper reporters who wrote articles regarding a professional issue, and that such conduct evidences professional misconduct in violation of

N.J.S.A. 45:1-21(e), and an incapacity to perform the functions of a licensee *in* a manner consistent with the public safety and welfare in violation of N.J.S.A. 45:1-2(i). We further find that respondent's admitted conduct constitutes acts evidencing a lack of good moral character pursuant to N.J.S.A. 45:9-6.[7] We find it unnecessary to determine whether the admissions of respondent are sufficient to constitute violations of N.J.S.A. 45:1-21(f).[8]

Following entry of summary decision on the complaint a hearing was conducted on the penalty phase of this matter, at which respondent was afforded an opportunity to make any presentations in mitigation *of* penalty which he deemed appropriate.' Dr. Lee testified regarding his educational and personal background. Re described the circumstances surrounding his sending of the e-mails from the doctor's lounge at Englewood Hospital after hearing other

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[7] While the Board has made this finding based on the admissions of respondent, the Board notes that it would come to the same disciplinary result articulated below based on its findings herein of professional misconduct and incapacity due to the underlying facts, even absent a finding of lack of good moral character.

[8] Thus the Board finds it unnecessary, in this matter, based on the other conclusions reached, to determine whether each of the elements of *a* crime of making terroristic threats has been established in order to determine whether respondent has engaged in acts constituting a crime of moral turpitude or a crime relating adversely to the practice or medicine.

[9] During the penalty phase *of* the .hearing, the following documents were entered into evidence:

R-1 Dr. Goldstein's C.V.
R-2 Dr. Lee's C.V.
P-1 Bergen Record News article 2/10/03

physicians complain about the news article which indicated that doctors should not strike and that walkouts were unfair to patients. He responded to the writers of the article, "in a stupid manner" with e-mails which he sent without "very much thought" and expected *the* recipients would write back trying to figure out who he was (as the e-mails were not signed). He made up the sender's name as "YougonnaDie", but he claimed *it* was never his intent "to injure or scare" the recipients. It was his contention that he sent the e-mails without really thinking about *the* content or the consequences of his actions. It was respondent's further testimony that he reread what he wrote before hitting the "send button." Further, he acknowledged that he sent a second e-mail to the two reporters six days later when he was in the doctor's lounge again, checked for a response, and saw there was none. Respondent asserted he immediately admitted that he sent the e-mails when confronted by the police, and that he resigned from his practice and from staff privileges *at* the hospital. He has since entered a practice elsewhere, and obtained provisional hospital privileges.

Since the incident, Dr. Lee contacted the Physicians Health Program, has undergone weekly counseling and was referred for a psychiatric evaluation. He alleges he now realizes that the time of the incidents was a stressful time in his life regarding his family's expectations relating to marriage and that he sent the *e*-mails in response to his anger at events going on in his life.

Finally, respondent expressed his remorse as to the reporters, acknowledged "[T]hey felt in fear of their lives", and expressed remorse for those he disappointed-his family, his peers and himself. Upon cross examination, respondent admitted that he reread the e-mails after they were composed and chose the name ("YougonnaDie') he used as "sender," and he agreed that a reasonable person, or the reporters receiving the content of these e-mails, would be apprehensive.

Respondent also presented the testimony of psychiatrist Robert Goldstein, M.D., who examined respondent on two occasions in May 2003. At that time his official diagnosis was adjustment disorder with depression. He further testified regarding the "culture clash" in respondent's family, and the stress resulting from the expectations and pressure of his parents to marry a person approved by them, as a dutiful son. Dr. Goldstein asserted his belief that matters came to a head immediately preceding the incident as respondent hid a relationship he had from his parents and reacted to multiple pressures he was experiencing. Dr. Goldstein posited that this pressure led respondent to impulsively send the e-mails in question, "...as kind of blowing off steam... ." Dr. Goldstein's testimony included his opinion that Dr. Lee engaged in "an abhorrent isolated act", that his "...conduct was disproportionate and inappropriate" but that he does not pose any risk in his practice or to the community, has adhered to high

levels of ethical and moral behavior in his life, and that he is very embarrassed and ashamed of what he has done.

The Board has considered all of *the* testimony and evidence submitted, as well as the arguments of counsel. We find that respondent's repeated actions of sending two anonymous e-mail messages to two reporters in response to an article regarding a professional issue, the first threatening to hunt down and *seek* vengeance upon the reporters and the second threatening death, to be abhorrent behavior reflecting shockingly unacceptable judgment, especially given the time he had *to* reflect on his actions between the sending of the first and second messages and his admission that he reread the messages prior to sending them. His actions reflect poorly upon the profession as a whole as well. We have considered respondent's remorse, that he cooperated with authorities and has suffered professional and personal consequence from his actions. We have also taken into account respondent's longstanding family and social pressures and that he has sought the benefits of counseling. All of these factors have mitigated the discipline we would otherwise impose for the violations found herein. However, none of these factors excuse respondent's actions which call for a serious disciplinary and deterrent response of this Board, as well as rehabilitative measures to assure there is *no* recurrence of such unprofessional behavior, in order to protect the public.

IT IS THEREFORE ON THIS 14th DAY OF ~~JANUARY~~ April 2004

ORDERED:

1. The Attorney General's motion for summary decision with regard to Counts I and II of the Complaint is hereby granted with the exceptions noted above.

2. The license of respondent to practice medicine and surgery in the State of New Jersey is suspended for a period of one year, such suspension shall be entirely stayed and served as a period of probation. The period of suspension, thus stayed, is effective NUNC PRO TUNC DECEMBER 10, 2003, the day on which it was orally announced on the record."

3. During the period of probation and continuing thereafter until further order of the Board, respondent shall continue to participate with the Physician's Health Program (PHP), which participation shall include:

a) Ongoing psychotherapy a minimum of once per week with a psychiatrist or psychologist pre-approved by the board.

b) Attendance at such other meetings or PHP supervision as directed by the PHP.

c) Causing submission to the Board on his behalf every ninety (90) days by the PHP and his psychotherapist, of reports regarding his progress. The first such reports are to be submitted within thirty (30) days of the date of this order, and then reports are to be submitted every ninety (90) days thereafter.

4. No petition to change ok end respondent's involvement with the PHP or psychotherapy shall be considered by the Board until a minimum of one year has elapsed frcm the entry of this Order.

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[10] At the time of the announcement of this Order on the record, respondent moved for a stay pending appeal. The Board denied the motion for stay.

5. During the period of probation, respondent shall fully attend and successfully complete an ethics course pre-approved by the Board. Respondent shall provide documentation to the Board of his satisfaction of this provision prior to the end of the probationary period.

6. Respondent is hereby assessed a monetary penalty of $10,000, including $5,000 for each of the e-mails sent to two recipients one on February 10, 2003, and one on February 16, 2003. .Payment shall be made within thirty (30) days of the entry of this Order by means of a certified check or money order payable to the State of New Jersey and submitted to the Board.

7. Respondent is hereby assessed the investigative costs to the State and attorneys fees in this mater, except that attorneys fees are awarded beginning on September 5, 2003, the date of the filing of the complaint. The total of costs and fees awarded is $5,611.00 including $3,315-00 in attorneys fees and $2,296.00 in investigative costs.[11] Payment shall be made within thirty (30) days of the entry of this Order by means of a certified check or money order payable to the State of New Jersey and submitted to the Board.

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[11] No objection was received to the amount of costs and fees which are awarded according to the standard rates applicable to attorneys fees of the Attorney General and the costs of the Enforcement Bureau. The attorneys fees were calculated by reference to the timesheets which revealed that 22.1 hours were expended on and after the date of filing of the cornplaint.

8. Respondent shall comply with the Directives applicable to disciplined licensees attached hereto and made a part hereof.

9. Violation of any provision of this Order shall be grounds for the immediate activation of the stayed suspension provided above as well as any other action permitted by law.

NEW JERSEY BOARD OF MEDICAL EXAMINERS

By: David Wallace MD

David Wallace, M.D., President

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2240-81T3

In the Matter of the Suspension
or Revocation of the License of

ROBERT L. MILLER, M.D.

To Practice Medicine and
Surgery in the State of New
Jersey.

Argued: June 14, 1982 -- Decided: JUN 28 1982

Before Judges Bischoff, King and Polow.

On appeal from the State Board of Medical Examiners.

Steven I. Kern argued the cause for appellant.

Joan D. Gelber, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel.)

PER CURIAM

Defendant, Robert L. Miller, M.D., was charged with gross malpractice and with professional misconduct in improperly prescribing a controlled dangerous substance, Percodan, in violation of N.J.S.A. 45:9-16(h); N.J.S.A. 45:1-21c,d,e, and h; N.J.A.C. 8:65-7.8(e); N.J.A.C. 8:65-7.5(a); N.J.A.C. 8:65-7.7; and N.J.A.C. 13:35-6.6(b).

Specifically, the complaint alleged that for inter-

mittent periods between 1966 and 1971 and then continuously from 1971 through 1979, defendant prescribed Percodan to a patient "in an indiscriminate manner, without good medical cause or medical indication, without adequate and/or any physical examination and with apparent lack of regard for the significant abuse potential of this drug." In addition, on numerous occasions defendant allegedly issued to this patient predated prescriptions and prescriptions issued in the name of another patient. This over-prescribing of Percodan supposedly induced or permitted the inducing of severe drug dependency in the patient.

An administrative hearing was held before an Administrative Law Judge, who filed a decision in which she recommended that the State Board of Medical Examiners dismiss the charges against Dr. Miller insofar as they charge him with gross malpractise (N.J.S.A. 45:9-16(h); N.J.S.A. 45:1-21c,d,e) and the violation of N.J.A.C. 8:65-7.7 She recommended that Dr. Miller be found guilty of failing to comply with regulations promulgated and administered by the Board, N.J.S.A. 45:1-23, and recommended the imposition of a $500 fine She further recommended that Dr. Miller be found guilty of violating N.J.A.C. 8:65-7.5(a), N.J.A.C 8:65-7.8(e) and N.J.A.C. 13:35-6.6(b)[1] and recommended the imposition of a $2,000 fine.

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[1] N.J.A.C. 8:65-7.5 Manner of issuance of prescriptions

(a) All prescriptions for controlled substances shall be dated as of, and signed on, the day when issued and shall bear the full name and address of the patient, and the name, address, and registration number of the practitioner. A practitioner may sign a prescription in the same manner as he would sign a check or legal document (e.g., J.H. Smith or John H. Smith). Where an oral order is not permitted, prescriptions shall be written with ink or indelible pencil or typewriter and shall be manually signed by the practitioner. The prescription

The Administrative Law Judge further recommended that defendant's records and prescriptions be periodically reviewed for two years by the Board of Medical Examiners to insure future compliance with the standard of practice of like physicians in New Jersey.

The Board of Medical Examiners affirmed the Administrative Law Judge's decision and imposed the recommended sanctions.

The facts of this case are for the most part undisputed and can be briefly stared as follows:

Before visiting defendant, the patient had suffered for several years from "restless leg syndrome," an organic disease that manifested itself through symptoms of muscle spasms, jerking and involuntary movements of the leg, often accompanied with backache and hip pain.

Defendant first prescribed Percodan for his patient to treat neuritis. The Percodan did not relieve the patient's neuritis; it did, however, help her leg symptoms.

Previous to seeing the defendant for her problem, the

(cont. from page 2)

may be prepared by a secretary or agent for the signature of a practitioner, but the prescribing practitioner is responsible in case the prescription does not conform in all essential respects to the law and regulations. A corresponding liability rests upon the pharmacist who fills a prescription not prepared in the form prescribed by these regulations.

N.J.A.C. 8:65-7.8 Requirement of prescription; schedule II

* * * *

(e) A practitioner shall not prescribe or dispense a Schedule II controlled substance to an individual patient in excess of 120 dosage forms or a 30 days' supply, whichever is the lesser amount.

N.J.A.C. 13:35-6.6 Requirements for issuing a prescription

* * * *

(c) The [illegible] and pediatrists shall provide the following

patient had tried various other ways to secure relief from her restless leg syndrome, to no avail. During the many years of her treatment by defendant, and upon defendant's advice, the patient continued to consult other physicians and to seek other methods of obtaining relief from her leg problem, without success.

In 1966, the patient began taking Percodan regularly. Between 1972 and 1978, she significantly increased her use of Percodan, sometimes receiving as many as four prescriptions at one time, written 2nd dated in advance. Defendant stipulated that he had written the prescriptions in evidence. These ?re-scriptions did not indicate the patient's age or full address. The multiple, predated prescriptions, given at one the, provided her with 100 pills per prescription, which is more than 120 doses and mare than a 30 day supply, contrary to the provisions of N.J.A.C. 13:35-6.6(b), N.J.A.C. 8:65-7.5(a) and N.J.A.C. 8:65-7.8(e).

By 1973, the patient was addicted to Percodan and taking 10 pills a day, even when her leg was not troubling her. The patient unsuccessfully attempted detoxification at clinics several times.

(cont. from page 3)

1. Full name, age and address of patient;
2. Prescriber's full name, address, telephone number and proper degree designation as appears on prescriber's license;
3. Prescriber's DEA number when required for the dispensing of controlled dangerous substances (Controlled Dangerous Substances Act of 1970). Each prescription for a controlled dangerous substance shall be written on a separate prescription blank;
4. Date of prescription;
5. Name, strength and quantities of drug or drugs to be dispensed;
6. Adequate instruction for the patient (P.R.N. or "as directed" [illegible] not sufficient).

We initially consider defendant's challenge to the administrative procedure established by the Legislature -2s creating an unconstitutional merger of functions Lii the Office of the Attorney General which deprived him of the basic elements of due process. He points out that the Deputy Attorney General initially investigates a complaint of a violation of a statute or regulation, presents the investigation to the Board and advises the Board with respect to whether there is cause for prosecution of the matter. If the Board determines to prosecute, the same Deputy Attorney General prepares and files a complaint and then prosecutes the complaint before the Board. Thereafter, another Deputy Attorney General consults with and advises the Board concerning the evidence and the law and may even draft the final order.

Defendant argues that "the potential for misconduct in a dual role deprives defendant of a fair hearing." and defendant cites the Pennsylvania cases of Bruteyn v. State Dental Council & Exam. Bd., 32 Pa. Commw. Ct. 541, 380 A. 2d 497 (1977); Goldberg v. Com., State Bd. of Pharmacy, 49 Pa. Commw. Ct. 123, 410 A. 2d 413 (1980), in support of this proposition. Initially, we observe that the statutes of Pennsylvania espouse a different philosophy and provide a strict internal separation with regard to professional licensing boards. That legislature provides for a different method of handling the problem. In New Jersey the procedure utilized has been specifically adopted by our Legislature. The Attorney General is charged by law to enforce the laws of this State, N.J.S.A. 52:17A-4h, and to give legal advice to all Boards of the State on matters as they may from time to

time require. N.J.S.A. 52:17A-4b. The legislation controlling the relevant procedure has effectively placed the exercise of the judicial function in the Board, completely separate and apart from the investigating and prosecuting function. Though there is substance to the fear that this concentration of powers may give rise to partiality in judgment, "the dangers of partiality inherent in the merger of functions are greatly minimized, if not entirely removed, when legislation effectively makes the investigating and prosecuting functions independent of the function of judging." In re Larsen, 17 N.J. Super. 564, 579 (App. Div. 1952)(Brennan, J. concurring). The procedure in effect in New Jersey for many years has received the approval of our courts. In re Larsen, supra. The Courts have fully recognized the fact that due process can be sufficiently protected by a separation of responsibility, by the open nature of the proceedings while the matter is still in trial, by the preserved record for appellate review, by the final written order and by the automatic right to appellate review. Withrow v. Larkin, 421 U.S. 35, 46-47 (1975). See also In re Blum, 109 N.J. Super. 125, 129 (App. Div. 1970), and In re Larsen, supra.

The New Jersey Legislature has recently still further minimized the danger of partiality by creating the Office of Administrative Law, an office staffed by independent judges who are charged with conducting the hearing in a fair and impartial manner and who are not employed by the agency involved. See N.J.S.A. 52:14F-1 et seq. and N.J.S.A. 52:14B-10(c).

The record here clearly discloses that a different

Other than to challenge the procedure authorized and utilized, defendant paints to no evidence or proof of bias, prejudice or violation of due process. We reject this contention of the defendant.

Defendant argues that the Board lacks jurisdiction to enforce N.J.A.C. 8:65-7.5(a) and N.J.A.C. 8:65-7.8(e) since both of these regulations were adopted by the Department of Health. This argument completely overlooks the fact *that* both the Board and the Administrative Law Judge found a violation of both the cited Department of Health regulations and also found a violation of N.J.A.C. 13:35-6.6(b), *a* regulation adopted by the Board of Medical. Examiners pursuant *to* the authority delegated to it by N.J.S.A. *45*:9-2. The Board had authority to fine defendant $2,000 for a violation of its regulation alone. N.J.S.A. 45:1-25. If it was error for *the* Board to include violation of the Department of Health regulations in its final order, the error was harmless for defendant does not attack the fines imposed as excessive, nor does he contend that the evidence did not support a finding of guilt of all the statutes and regulations of which he was found guilty.

Moreover, N.J.S.A. 45:1-25 provides for the imposition of a penalty for violation of a regulation administered by a Board of not more than $2,500. The penalties imposed here were well within that maximum.

Defendant also argues that he has been fined twice for violation of the same statute, claiming that the Board had authority to fine him only under N.J.S.A. 45:1-21h. Defendant's contention is inaccurate. N.J.S.A. 45:1-25 is the statute that

provides for an imposition of a monetary penalty. The penalty that was imposed here was pursuant to the authority conferred by that statute and was imposed for violations of the regulations above cited.

Defendant also argues that the Board did not have authority to assess investigative costs against him. This argument is clearly without merit as N.J.S.A. 45:1-25 specifically authorizes the assessment of costs for the use of the State.

Defendant's final arguments that the final order of the Board of Medical Examiners is inconsistent with the Administrative Law Judge's recommended decision and that the entry of the order by the Board constitutes a violation of the Open Public Meetings Act are clearly without merit.

One final observation is in order. The Administrative Law Judge stated that she was applying the "fair preponderance of the evidence" standard in reaching her conclusion. The applicability of that standard has recently been questioned by this Court. In re Polk License Revocation, 178 N.J. Super. 191 (App. Div. 1981), certif. gtd. 87 N.J. 398 (1981). However, here the facts which provide the basis for the determination of statutory and regulatory violations are virtually undisputed. So, whether the test be that applied by the Administrative Law Judge or the more stringent "clear and convincing" test, we hold the proofs fully support the final order of the Board of Medical Examiners. R. 2:10-5.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

DIRECTIVES APPLICABLE TO *ANY* MEDICAL BOARD LICENSEE WHO IS DISCIPLINED OR WHOSE SURRENDER OF LICENSURE HAS BEEN ACCEPTED

APPROVED BY THE BOARD ON MAY 10,2000

All licensees who are the subject of a disciplinary order of the Board are required to provide the information required on *the* addendum to these directives. The information provided will be maintained separately and will not be part of the public document filed with the Board. Failure to provide the information required may result in further disciplinary action for failing to cooperate with the Board, as required by N.J.A.C. 13:45C-1 et seq. Paragraphs 1 through 4 below shall apply when a license is suspended or revoked or permanently surrendered, with or without prejudice. Paragraph 5 applies to licensees who are the subject of an order which, while permitting continued practice, contains a probation or monitoring requirement.

1. Document Return and Agency Notification

The licensee shall promptly forward to the Board office at *Post* Office Box 183, 140 East Front Street, 2nd floor, Trenton, New Jersey 08625-0183, the original license, current biennial registration and, if applicable, the original CDS registration. In addition, if the licensee holds a Drug Enforcement Agency (DEA) registration, he or she shall promptly advise the DEA *of the* licensure action. (With respect to suspensions of a finite term, at the conclusion of the term, the licensee may contact the Board office for the return of the documents previously surrendered to the Board. In addition, at the conclusion of the term, the licensee should contact the DEA to advise of the resumption of practice and to ascertain the impact of that change upon his/her DEA registration.)

2. Practice Cessation

The licensee shall cease and desist from engaging in the practice of medicine in this State. This prohibition not only bars a licensee from rendering professional services, but also from providing an opinion as to professional practice or its application, or representing him/herself as being eligible to practice. (Although the licensee need not affirmatively advise patients or others of the revocation, suspension or surrender, the licensee must truthfully disclose his/her licensure status in response to inquiry.) The disciplined licensee is also prohibited from occupying, sharing or using office space in which another licensee provides health care services. The disciplined licensee may contract for, accept payment from another licensee for or rent at fair market value office premises and/or equipment. In no case may the disciplined licensee authorize, allow or condone the use of his/her provider number by any health care practice or any other licensee or health care provider. (In situations where the licensee has been suspended for less than one year, the licensee may accept payment from another professional who is using his/her office during the period that the licensee is suspended, for the payment of salaries for office staff employed at the time of the Board action.)

A licensee whose license has been revoked, suspended for one (1) year or more or permanently surrendered must remove signs and take affirmative action to stop advertisements by which his/her eligibility to practice is represented. The licensee must also take steps to remove his/her name from professional listings, telephone directories, professional stationery, or billings. If the licensee's name is utilized in a group practice title, it shall be deleted. Prescription pads bearing the licensee's name shall be destroyed. A destruction report form obtained from the Office of Drug Control (973-504-6558) must be filed. If no other licensee is providing services at the location, all medications must be removed and returned to the manufacturer, if possible, destroyed or safeguarded. (In situations where a license has been suspended for less than one year, prescription pads and medications need not be destroyed but must be secured in a locked place for safekeeping.)

3. Practice Income Prohibitions/Divestiture of Equity Interest in Professional Service Corporations and Limited Liability Companies

A licensee shall not charge, receive or share in any fee for professional services rendered by him/herself or others while barred from engaging in the professional practice. The licensee may be compensated for the reasonable value of services lawfully rendered and disbursements incurred on a patient's behalf prior to the effective date of the Board action.

A licensee who is a shareholder in a professional service corporation organized *to* engage in *the* professional practice, whose license is revoked, surrendered or suspended for a term of one (1) year or more shall be deemed to be disqualified from the practice within the meaning of the Professional Service Corporation *Act.* (N.J.S.A. 14A:17-11). A disqualified licensee shall divest him/herself of all financial interest in the professional service corporation pursuant to N.J.S.A. 14A:17-13(c). A licensee who is a member of a limited liability company organized pursuant to N.J.S.A. 42:1-44, shall divest himherself of all financial interest. Such divestiture shall occur within 90 days following the the entry of the Order rendering the licensee disqualified to participate in the applicable form of ownership. Upon divestiture, a licensee shall forward to the Board a copy of documentation forwarded to the Secretary of State, Commercial Reporting Division, demonstrating that the interest has been terminated. If the licensee is the sole shareholder in a professional service corporation, the corporation must be dissolved within 90 days of the licensee's disqualification.

4. Medical Records

If, as a result of the Board's action, a practice is closed or transferred to another location, the licensee shall ensure that during the three (3) month period following the effective date of the disciplinary order, a message will be delivered to patients calling the former office premises, advising where records may be obtained. The message should inform patients of the names and telephone numbers of the licensee (or his/her attorney) assuming custody of the records. The same information shall also be disseminated by means of a notice to be published at least once per month for three (3) months in a newspaper of

general circulation in the geographic vicinity in which the practice was conducted. At the end of the three month period, the licensee shall file with the Board the name and telephone number of the contact person who will have access to medical records of former patients. Any change in that individual or his/her telephone number shall be promptly reported to *the* Board. When a patient or hidher representative requests a copy of his/her medical record or asks that record be forwarded to another health care provider, the licensee shall promptly provide the record without charge to the patient.

5. **Probation/Monitoring Conditions**

With respect to any licensee who is the subject of any Order imposing a probation or monitoring requirement or a stay of an active suspension, in whole or in part, which is conditioned upon compliance with a probation or monitoring requirement, the licensee shall fully cooperate with the Board and its designated representatives, including the Enforcement Bureau of the Division of Consumer Affairs, in ongoing monitoring of *the* licensee's status and practice. Such monitoring shall be at the expense *of* the disciplined practitioner.

(a) Monitoring of practice conditions may include, but is not limited to, inspection of the professional premises and equipment, and Inspection and copying of patient records (confidentiality of patient identity shall be protected by the Board) to verify compliance with the Board Order and accepted standards of practice.

(b) Monitoring of status conditions for an impaired practitioner may include, but is not limited to, practitioner cooperation in providing releases permitting unrestricted access to records and other information to the extent permitted by law from any treatment facility, other treating practitioner, support group or other individual/facility involved in the education, treatment, monitoring *or* oversight of the practitioner, or maintained by a rehabilitation program for impaired practitioners. If bodily substance monitoring has been ordered, the practitioner shall fully cooperate by responding to a demand for breath, blood, urine or other sample in a timely manner and providing the designated sample.

NJ License #

ADDENDUM

Any licensee who *is* the subject *of* an order of the Board Suspending, revoking or otherwise conditioning the license, shall provide the following information at the time that the order is signed, if it is entered by consent, or immediately after service of a fully executed order entered after a hearing. The information required here is necessary for the Board to fulfill its reporting obligations:

Social Security Number[1]: _____

List the Name and Address of any and all Health Care Facilities with which you are affiliated:

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List the Names and Address of any and all Health Maintenance Organizations with which you are affiliated:

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Provide the names and addresses *of* every person with whom you are associated in your professional practice: (You may attach a blank sheet of stationery bearing this information).

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[1] Pursuant to 45 CFR Subtitle A Section 61.7 and 45 CFR Subtitle A Section 60.8, the Board *is* required to obtain your Social Security Number and/or federal taxpayer identification number in order to discharge its responsibility to report adverse actions to the National Practitioner Data Bank and the HIP Data Bank.

NOTICE OF REPORTING PRACTICES OF BOARD REGARDING DISCIPLINARY ACTIONS

Pursuant to N.J.S.A. 52:14B-3(3), all orders of the New Jersey State Board of Medical Examiners are available for public inspection. Should any inquiry be made concerning the *status of* a licensee, the inquirer will be informed of the existence of the order and a copy will be provided if requested, All evidentiary hearings, proceedings on motions or other applications which are conducted as public hearings and the record, including the transcript and documents marked in evidence, are available for public inspection, upon request

Pursuant to 45 CFR Subtitle A 60.8, *the* Board is obligated to report to the National Practitioners Data Bank any action relating to a physician which is based on reasons relating to professional competence or professional conduct:

(1) Which revokes or suspends *(or* otherwise restricts) a license,
(2) Which censures, reprimands or places *on* probation,
(3) Under which a license is surrendered.

Pursuant to 45 CFR Section 61.7, *the* Board is obligated to report to the Healthcare Integrity and Protection (HIP) Data Bank, any formal or official actions, such as revocation or suspension of a license (and *the* length of any such suspension), reprimand, censure or probation or any other loss of license or the right to apply for, or renew, a license of the provider, supplier. or practitioner, whether by operation of law, voluntary surrender, non-renewability, or otherwise, or any other negative action or finding by such Federal or State agency *that* is publicly available information.

Pursuant to N.J.S.A. 45:9-19.13, if the Board refuses to issue, suspends, revokes or otherwise places conditions on a license or permit, it is obligated to notify each licensed health care facility and health maintenance organization with which *a* licensee is affiliated and every other board licensee in this state with whom he or she is directly associated In private medical practice.

In accordance with an agreement with the Federation of State Medical Boards *of* the United States, a list of all disciplinary orders are provided to that organization *on* a monthly basis.

Within the month following entry of an order, a summary of the order will appear on the public agenda *for* the next monthly Board meeting and is forwarded *to* those members of the public requesting a copy. In addition, the same summary will appear in the minutes of that Board meeting, which are also made available *to* those requesting a copy.

Within the month following entry of an order, a summary of the order will appear in a Monthly Disciplinary *Action* Listing which is made available to those members of the public requesting a copy.

On a periodic basis the Board disseminates to its licensees a newsletter which includes a brief description *of* all of the orders entered by the Board.

From time to time, the Press Office of the Division *of* Consumer Affairs may issue releases including the summaries of the content of public orders.

Nothing herein is intended in any way to limit the Board, the Division or the Attorney General from disclosing any public document.